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10 UNITED STATE DISTRICT COURT
11 EASTERN DISTRICT OF WASHINGTON

12 UNITED STATES OF AMERICA,
13
14 Plaintiff,
15
16 v.
17 ALEXIS GARCIA PALOMINO
18 Defendant
19

4:15-CR-06049-EFS-4
MEMORANDUM RE: SPEEDY
TRIAL ISSUES

20 ALEXIS PALOMINO, through counsel Jeffrey Scott Niesen in
21 accordance with the Court's briefing order submits the following on the
22 Speedy trial issue raised *sue sponte* by the Court. "Under the Speedy Trial
23 Act a defendant must be brought to trial within 70 days from the filing date
24 of the information or indictment, or from the date the defendant appeared
25 before a judicial officer of the court in which such charge is pending,
26 whichever date last occurs." *U.S. v. Duque*, 62 F.3d 1146, 1149 (9th Cir.
27 1995); citing 18 U.S.C. § 3161(c)(1).
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3 I. STANDARDS OF REVIEW

4 “We review the district court's disposition of a Speedy Trial Act issue for
5 clear error as to factual findings and de novo as to application of legal
6 standards.” *United States v. Brickey*, 289 F.3d 1144, 1150 (9th Cir.2002)
7 (internal quotation marks omitted).
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10 II. FACTS

11 On December 16, 2015 the United States indicted Alexis Garcia
12 Palomino as the fourth defendant alleging his involvement in a drug
13 conspiracy with Jese Casillas. On September 7, 2016 the United States
14 filed its first superseding indictment again naming Palomino as a co-
15 conspirator in the overall conspiracy. (ECF 67). In an Order dated October
16 3, 2016 the Court declared the entire case complex and set a trial date in
17 October 2018 (ECF 101). A Second Superseding Indictment was filed and
18 Defendant Palomino was arrested and arraigned March 28, 2018 on that
19 Indictment.
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21 A status conference was held and March 29, 2018 the Court stated as
22 follows:
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24 “Pursuant to 18 U.S.C. Sec. 3161 (h) (7) (B) (i), (iii) and (iv), the
25 Court **DECLARES EXCLUDABLE** from Speedy Act calculations
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1 the period from **March 29, 2018**, the date of this Order, though
 2 **October 10, 2018**, the new trial date, as the period of delay granted
 3 for adequate preparation by counsel as to Defendant Palomino only”.
 4 (ECF 740).
 5

6 On May 14, 2018 Palomino filed a motion for a continuance of
 7 his trial. (ECF 774)
 8

9 On May 30, 2018 the Court entered an order severing Palomino
 10 and a later appearing co-defendant from the October 10, 2018 trial and
 11 directed them to meet with government counsel to work out agreed
 12 case management dates including a date for trial. (ECF 802) . The
 13 parties recommended a trial date of March 25, 2019, which was
 14 ordered by the Court. (ECF 802).
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 16

17 While it was not specifically set forth, it was the understanding of
 18 counsel that case had been declared complex and that the continuance
 19 was granted so that counsel would have sufficient time to review
 20 discovery, prepare motions and prepare for trial.
 21

22 III. DISCUSSION

23 “The Sixth Amendment guarantees that, ‘in all criminal
 24 prosecutions, the accused shall enjoy the right to a speedy ...trial....’”
 25 *Doggett v. U.S.*, 505 U.S. 647, 651 (1992). The Supreme Court looks to
 26 four separate enquiries: (1) whether delay before trial was uncommonly
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1 long, (2) whether the government or the criminal defendant is more to
2 blame for that delay, (3) whether the defendant asserted his right to a
3 speedy trial, and (4) whether he suffered prejudice as the delay's result.
4
5 *Id.*; see *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

6 This case does not meet the first enquiry because the delay between
7 accusation and trial is not presumptively prejudicial to Mr. Palomino . The
8 initial trial date in this case was set within a few days after Mr. Palomino
9 was arraigned. He subsequently requested a continuance of the trial to allow
10 counsel sufficient time to properly prepare.”
11

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13 The Speedy Trial Act has numerous exclusions from the computation of
14 the 70-day period, including time designated for transport of defendants and
15 for the preparation and hearing of motions. *Id.* These exclusions apply to all
16 co-defendants in a case. *Id.*; citing *U.S. v. Butz*, 982 F.2d 1378, 1381 (9th
17 Cir.), *cert. denied*, 114 S.Ct. 250 (1993). “When a superseding indictment
18 contains charges which must be joined with the original charges, Speedy
19 Trial Act calculations begin from the date of the original indictment.” *Id.*
20 citing *U.S. Clymer*, 25 F.3d 824, 827 n.2 (9th Cir. 1994). Essentially, the new
21 charges would retain the original Speedy Trial clock.
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25 The main exclusion of concern is 18 U.S.C. § 3161(h)(7)(ii) that in
26 the ends of justice served by the granting of a continuance outweighs the
27 best interests of the public and the defendant in a speedy trial. The factor set
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1 out in section (ii) states: “ Whether the case is so unusual or so complex, due
2 to the number of defendants, the nature of the prosecution, or the existence
3 of novel questions of fact or law, that it is unreasonable to expect adequate
4 preparation for pretrial proceedings or for the trial itself within the time
5 limits established by this section.” 18 U.S.C. §3161(h)(7)(ii).
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8 “If any indictment or information is dismissed upon motion of the
9 defendant, or any charge contained in a complaint filed against an individual
10 is dismissed or otherwise dropped... and thereafter... an information or
11 indictment is filed charging such defendant with the same offense or an
12 offense based on the same conduct... [the Speedy Trial Act clock starts
13 fresh].” *Id.* at 1150; citing 18 U.S.C. § 3161(b)(1); *see also U.S. v. McCown*,
14 711 F.2d 1441, 1446 (9th Cir. 1983 (when indictment dismissed on defense
15 motion “any subsequent step toward prosecution causes the time period to
16 begin running anew.”). “If the indictment is dismissed at the government’s
17 behest, on the other hand, and thereafter a charge is filed against the
18 defendant for the same offense, or any offense required to be joined with
19 that offense, any period of delay from the date the charge was dismissed to
20 the date the time limitation would commence to run as to the subsequent
21 charge had there been no previous charge [is tolled].” *Id.*; citing 18 U.S.C. §
22 3161(b)(1); *see also U.S. v. Feldman*, 788 F.2d 544, 548 (9th Cir. 1986), *cert*
23 *denied*, 479 U.S. 1067, (1987) (citation omitted).
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1 “The text of the statute, as well as Ninth Circuit case law, thus suggest
2 that the identity of the author of the motion for dismissal is paramount in
3 determining whether the clock should be restarted or merely tolled.” *Id.* at
4 1150.; *see Feldman*, 788 F.2d at 549 (noting that 18 U.S.C. § 3161(d)(1)
5 may apply “to any manner of dismissal of an indictment except on the
6 government’s own motion,” and should apply where the defendant rather
7 than the government benefits from the dismissal); *see also McCown*, 711
8 F.2d 1446.

9 In the present case, Mr. Palomino has not moved the Court for
10 dismissal of the indictment based upon the Speedy Trial Act. Neither party
11 benefits from a dismissal of the indictment, because the Government can
12 either re-indict the case or supersede, thereby bringing this case back to
13 square one. Counsel believes that the speedy trial clock has not run due to
14 the entire case being declared complex, that ECF 101 binds Mr. Palomino
15 even though he appeared subsequently and the fact that a motion to continue
16 the trial was filed.. The complexity of this case derives from the significant
17 amount of discovery and trial preparation involved. Mr. Palomino did not
18 disagree with the March 25, 2019, trial date and does not believe there are
19 any speedy trial issues based upon the above.

20 Dated this 18th day of January 2019.

21 Respectfully Submitted,

s/Jeffrey Niesen
WSBA # 33850
Attorney for Defendant Palomino

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following: Assistant United States Attorney Stephanie Van Marter.

s/Jeffrey S. Niesen
WSBA # 33850
Attorney for Alexis Garcia Palomino